

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE**

Before:

**The Hon'ble The Chief Justice T. S. Sivagnanam
and
The Hon'ble Justice Hiranmay Bhattacharyya**

APO/104/2022

**STATE BANK OF INDIA AND ANR.
Versus
VARUN ROSHAN KOHLI & ORS.**

For the Appellant	: Mr. Om Narayan Rai, Mr. Shiv Mangal Singh, Ms. Jahanara Kulsum,	advocate
For the Respondent No. 1	: Mr. Naresh Kohli	advocate
For Union of India	: Mr.Sardha Sha,	advocate
Reserved on	: 17.01.2024	
Judgment on	: 25.01.2024	

Hiranmay Bhattacharyya, J.:-

1. The judgment and order dated 03.11.2022 passed by a learned Single Judge in WPO 2366 of 2022 is under challenge in this intra court appeal at the instance of the State Bank of India.

2. The respondent no. 1 filed the writ petition being WPO 2366 of 2022 praying for specific performance of the letter of Arrangement dated June 28, 2021, refund of a sum of Rs. 92,56,733/- together with interest and for setting aside the notices dated April 7, 2022 and July 5, 2022 issued under Section 13(2) and 13(4) of the SARFAESI Act, 2002 respectively.

3. By the judgment and order impugned, the State Bank of India (for short “the Bank”) was directed to give effect to the letter of Arrangement dated 28.06.2021 and to give the benefit of the same to the writ petitioner/ respondent no. 1 herein. Any amount appropriated by the Bank from the account of the petitioner for the purpose of adjustment or otherwise was also directed to be returned to the respondent no. 1 within a specified time.

4. The facts leading to the filing of the writ petition and this appeal, in a nutshell, are as follows.

5. The respondent no. 1 had three separate transactions with the appellant Bank which consisted of a loan for the business, a housing loan and a vehicle loan. The credit facility for the business had an overall limit of Rs. 3.50 crores, of which the Cash Credit (for short ‘CC’) Limit was Rs. 75 lakhs and the Letters of Credit (for short “LC”) and Bank Guarantees (for short “BG”) had the limits of Rs. 75 lakhs and Rs. 2 crores respectively. The respondent no. 1 claims that on account of Covid 19 pandemic and repeated lockdowns he ran out of funds for which he could not repay the LCs for which 4 LCs amounting to Rs. 1.62 crores devolved. The respondent no. 1 applied for restructuring of his account on May 30, 2021. On September 27, 2021, the respondent no. 1, as per the instructions of the officials of the Bank, signed the letter dated 28th June, 2021 without putting any date. From the restructuring letter dated June 28, 2021, the respondent no. 1 came to know that the original LC limit had become Zero as the devolved LCs amounting to Rs. 1.62 crores had been converted into a Term Loan with a moratorium of one year and the first installment payment would start in June 2022. The respondent no. 1 by letters dated August 19, 2021 and August 27, 2021 requested the authorities of the Bank to open a LC for Rs. 50 lakhs after taking Rs. 92.56 lakhs from him but the Bank without opening the LC for Rs. 50 lakhs paid the sum of Rs. 92.56 lakhs to Working

Capital Term Loan (WCTL) and Funded Interest Term Loan (FITL) which was not payable on August 27, 2021 but in June, 2022.

6. Mr. Om Narayan Rai, learned Advocate appearing in support of this appeal, at the outset, submitted that the writ petition was not maintainable in view of availability of efficacious remedies under the SAEFAESI Act, 2002. He submitted that the accounts of the respondent no. 1 had been classified as Non Performing Asset (for short “NPA”) and action under Section 13(4) of the SARFAESI Act, 2002 had been taken by the Bank after issuance of notice under Section 13(2) of the Act. In support of his contention on maintainability he placed reliance upon the decisions of the Hon’ble Supreme Court in the cases of **Authorised Officer, State Bank of Travancore and Anr vs Mathew K.C.** reported at (2018) 3 SCC 85, **ICICI Bank Limited vs Umakanta Mohapatra and Ors** reported at (2019) 13 SCC 497 and **Phoenix ARC Private Limited vs. Vishwa Bharati Vidya Mandir and Ors.** reported at (2022) 5 SCC 345.

7. He further submitted that after the loan accounts of the respondent no. 1 were classified as NPA, the appellants have filed recovery proceedings before the learned Debts Recovery Tribunal-1, Kolkata being O.A. No. 300 of 2022 inter alia praying for issuance of a recovery certificate against the respondent no. 1.

8. He contended that immediately after filing the writ petition, the respondent no. 1 filed an application under Section 17 of the SARFAESI Act, 2002 being SA 221 of 2022 for self same reliefs and, therefore, the writ petition was liable to be dismissed as a party cannot be allowed to avail two parallel remedies. In support of such contention, Mr. Rai placed reliance upon the decision of the Hon’ble Supreme Court in the case of **Devi Ispat Limited & Anr. vs. State Bank of India** reported at (2014) 5 SCC 762.

9. By drawing the attention of the Court to various correspondences between the parties and the statements of accounts, Mr. Rai contended that the finding of the learned Single Judge, that the respondent no. 1 was not

informed of the extension of the time limit by reason of restructuring of the accounts, is a perverse one.

10. Mr. Rai submitted that after acceptance of the fresh sanction letter dated 11.11.2021 by the respondent no.1, the earlier letter of restructuring dated 28.06.2021 got novated and substituted. In support of such contention, he placed reliance upon the decision of the Hon'ble Supreme Court in the case of **National Insurance Company Limited vs. Baghore Polylab (P) Limited** reported at **(2009) 1 SCC 269**.

11. Mr. Rai, concluded by submitting that the writ petition was also liable to be dismissed on the ground of delay as the same was filed only in July, 2022 when the respondent no. 1 became aware of the restructuring of accounts on September 26, 2021. In support of his contention that the writ petition is liable to be dismissed on the ground of delay, Mr. Rai placed reliance upon the decision in the case of **U.P Jal Nigam & Anr. vs. Jaswant Singh & Anr.** reported at **(2006) 11 SCC 464**.

12. Respondent no. 1, appearing in person, disputed the submission of Mr. Rai. Mr. Kohli contended that he was not aware that his account was restructured and there was a moratorium of 12 months for repayment of the principal and interest as the letter dated 28th June, 2021 was not served upon him. For such reason the letter dated 19th August, 2021 was issued by him requesting the Bank to take the amount of Rs. 162 lakhs and restore the original limits of LC, BG and CC totaling Rs. 3.50 crores. He further contended that the Bank took Rs. 92.56 lakhs from the Cash Credit Account and paid off a Working Capital Term Loan on 27th September 2021 which was neither due nor payable on that date in view of restructuring of the accounts. According to Mr. Kohli, such action was in clear violation of the letter dated 28th June, 2021. He submitted that the letter dated 28th June 2021 was given to him only on 27th November 2021, long after the Bank took a sum of Rs. 92.56 lakhs from his account without his consent to pay off a loan account which was not due on 27th August, 2021. On the issue of

maintainability of the writ petition, Mr. Kohli contended that only after an account is classified as NPA, the Debts Recovery Tribunal has to be approached. He contended that his accounts could not have been classified as NPA either on 27th August 2021 or on 18th March 2022 in view of the restructuring of the accounts vide letter dated 28th June 2021. The illegal action of the Bank in prepaying a loan account resulted in a massive cash flow imbalance for which the respondent no. 1 was constrained to approach the writ court. He prayed for dismissal of this appeal with exemplary costs.

13. Heard the learned advocates for the parties and perused the materials placed.

14. It is not in dispute that the respondent no. 1 had three separate transactions with the appellant bank which consisted of a Cash Credit Loan, a Housing Loan and a Vehicle Loan. The credit facilities sanctioned by the appellant bank in favour of the respondent no. 1 were classified by the appellant bank as NPA on 18th of March 2022. Thereafter, notice dated 7th April 2022 was issued under Section 13(2) of SARFAESI Act, 2002. Notice under Section 13(4) of the said Act was issued on 5th July 2022. The writ petition was filed on 20th July, 2022 i.e. after issuance of the notice under Section 13(4) of the said Act. It appears from the writ petition that the respondent no. 1 filed the writ petition challenging the issuance of notices issued under Section 13(2) and 13(4) of the SARFAESI Act, 2002, including the illegal and arbitrary action on the part of the appellant bank for alleged non-compliance of the letter of arrangement dated June 28, 2021.

15. The Hon'ble Supreme Court in ***Phoenix ARC Private Limited (supra)***, after taking note of the various decisions, held that writ petitions at the instance of borrowers against the proposed action to be taken under Section 13(4) of the SARFAESI Act, 2002 is an abuse of process of the Court in view of the statutory, efficacious remedy available by way of appeal under Section 17 of the SARFAESI Act. It was further held that under such situation the

High Court ought not to have entertained the writ petitions. The Hon'ble Supreme Court held thus-

“10. In Satyawati Tandon, it was observed and held by this Court that the remedies available to an aggrieved person against the action taken under Section 13(4) or Section 14 of the SARFAESI Act, by way of appeal under Section 17, can be said to be both expeditious and effective. On maintainability of or entertainability of a writ petition under Article 226 of the Constitution of India, in a case where the effective remedy is available to the aggrieved person, it is observed and held in the said decision in paras 43 to 46 as under:-

“43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc. the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

44. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in

appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution.

45. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance.

*46. It must be remembered that stay of an action initiated by the State and/or its agencies/instrumentalities for recovery of taxes, cess, fees, etc. seriously impedes execution of projects of public importance and disables them from discharging their constitutional and legal obligations towards the citizens. In cases relating to recovery of the dues of banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institutions, which (sic will) ultimately prove detrimental to the economy of the nation. Therefore, the High Court should be extremely careful and circumspect in exercising its discretion to grant stay in such matters. Of course, if the petitioner is able to show that its case falls within any of the exceptions carved out in **Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad [AIR 1969 SC 556]**, **Whirlpool Corpn. v. Registrar***

of Trade Marks [(1998) 8 SCC 1] and Harbanslal Sahnia v. Indian Oil Corpn. Ltd. [(2003) 2 SCC 107] and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass an appropriate interim order.”

11. In the case of **City and Industrial Development Corpn. Vs. Dosu Aardeshir Bhiwandiwalla**, (2009) 1 SCC 168, it was observed by this Court in paragraph 30 that the Court while exercising its jurisdiction under Article 226 is duty bound to consider whether the petitioner has any alternative or effective remedy for the resolution of the dispute.”

12. In the case of *Kanaiyalal Lalchand Sachdev and Ors. (supra)* after referring to the earlier decisions of this Court in the cases of **Sadhana Lodh Vs. National insurance Co. Ltd. and Anr.**, (2003) 3 SCC 524; **Surya Dev Rai Vs. Ram Chander Rai and Ors.**, (2003) 6 SCC 675 and **State Bank of India Vs. Allied Chemical Laboratories and Anr.**, (2006) 9 SCC 252 while upholding the order passed by the High Court dismissing the writ petition on the ground that an efficacious remedy is available under Section 17 of the SARFAESI Act, it was observed that ordinarily relief under Articles 226/227 of the Constitution of India is not available if an efficacious alternative remedy is available to any aggrieved person.

13. Similar view has been expressed by this Court in subsequent decisions in the case of *General Manager, Sri Siddeshwara Cooperative Bank Limited & Anr. (supra)* as well as in the case of *Agarwal Tracom Private Limited (supra)*.”

16. The Hon’ble Supreme Court in **Phoenix ARC (supra)** held that the remedies available to an aggrieved person against the action taken under Section 13(4) of the SARFAESI Act by way of appeal under Section 17 of the Act is both expeditious and effective and the High Court while exercising its

jurisdiction under Article 226 is dutybound to consider whether the petitioner has any alternative or effective remedy for resolution of dispute.

17. Keeping in mind the well settled proposition of law laid down by the Hon'ble Supreme Court in the aforesaid decision, this Court has to now consider whether the learned Single Judge was justified in entertaining the writ petition.

18. It is not in dispute that immediately after filing the writ petition, the respondent no. 1 filed an application under Section 17 of the SARFAESI Act, 2002 before the Debts Recovery Tribunal -1 Kolkata which was registered as SA No. 221 of 2022. After going through the application filed by the respondent no. 1 being SA 221 of 2022, this Court finds that the respondent no. 1 herein prayed for setting aside the notice dated April 7, 2022 issued under Section 13(2) of the SARFAESI Act, 2002 and the possession notice dated July 5, 2022 under Section 13(4) of the said Act and also prayed for an order directing refund of Rs. 92.56 lakhs along with interest to the respondent no. 1 herein by the appellant bank against alleged wrongful transfer of funds from the Cash Credit Account to the Working Capital Term Loan Account without the knowledge and consent of the respondent no. 1. Therefore, it is evident that more or less identical reliefs have been claimed by the writ petitioner/ respondent no. 1 herein in the writ petition as well as in SA 221 of 2022.

19. After going through the impugned judgment and order it appears to this Court that the writ petitioner/ respondent no. 1 herein sought to pursue the proceedings which are already pending before the Debts Recovery Tribunal in so far as the notices issued by the Bank under Sections 13(2) and 13(4) of the SARFAESI Act, 2002. In the light of the modified reliefs sought by the writ petitioners before the writ court, the learned Single Judge noted that the relief sought for, from the writ court only relates to the conduct of the bank in failing to inform the writ petitioner of the restructuring, and

compelling the writ petitioner to allow the bank to appropriate substantial sums of money leading to further defaults on the part of the petitioner.

20. The learned Single Judge after recording that since the relief of actions under the SARFAESI Act, 2002 is not being pressed, the writ petition is maintainable. The learned Single Judge further held that the bank chose to remain silent at the material point of time and failed to inform the writ petitioner of certain extended time limit relaxation by reason of the restructuring of the writ petitioner's accounts. On the basis of such finding the learned Single Judge directed the bank to give effect to the letter of arrangement dated 28th June, 2021 and to give benefit of the same to the writ petitioner and also directed that any money appropriated by the bank from the account of the writ petitioner/ respondent no. 1 for the purpose of adjustment of otherwise should be returned within a specified time limit.

21. After perusing the impugned judgement and order this Court finds that what weighed in the mind of the learned Single Judge was that the failure on the part of the Bank to inform the respondent no.1 of the letter of arrangement dated 28th June, 2021, led to further defaults on the part of the writ petitioner.

22. Mr. Rai, learned Advocate for the Bank drew the attention of the Court to various correspondences between the parties as well as the statement of accounts in support of his contention that the respondent no. 1 was fully aware of the restructuring of accounts at the relevant point of time. Mr. Kohli, on the other hand, placed reliance upon some of the correspondences in support of his contention that he came to know of the restructuring of accounts for the first time only on 27.11.2021.

23. Record reveals that the appellant bank sanctioned the credit facilities to the tune of Rs. 3.50 crores which consisted of Cash Credit with a limit of Rs. 0.75 crores, LC with a limit of Rs.2.00 crores and BG with a limit of Rs.0.75 crores. Admitting that the account became irregular due to non-receipt of fund from Kerala Police within the stipulated time for Covid-19 Pandemic,

the respondent no. 1 by a letter dated May 28, 2021 submitted necessary documents with a request to the bank to restructure the credit facilities. It is evident from the record that by a letter dated June 28, 2021 the bank has sanctioned the credit facilities in the manner as specifically contained in the said letter. It appears from the said letter that the existing LC limit of Rs. 2.00 crores was revised to zero and the existing bank guarantee of Rs. 0.75 crores was revised to Rs. 0.67 crores. A Working Capital Term Loan (for short "WCTL") of Rs. 1.58 crores and Fixed Investment Term Loan (for short "FITL") of Rs. 0.04 crores was also sanctioned in favour of the respondent no. 1.

24. The respondent no. 1 claims that such restructuring of the credit facilities was not communicated to him at the relevant point of time. From the statement of accounts for the period 06.05.2021 to 01.07.2021, it appears that a sum of Rs. 1.58 crores and a further sum of Rs. 4 lakhs was credited to the account of the respondent no. 1.

25. The aforesaid amounts credited to the account of the respondent no.1 on 28.06.2021 appears to be in terms of the letter of arrangement dated 28.06.2021. It is difficult for this Court to accept the contention of the respondent no.1 that he was not aware of the said letter of arrangement at the relevant point of time in view of the aforesaid amount being credited to the account of the respondent no.1 coupled with the request made by the said respondent to allow LC of Rs. 50 lakhs with 20% margin.

26. This matter can also be looked into from a different angle.

27. It is evident from the materials on record that pursuant to an application of the respondent no. 1 dated 7th October 2021 for restoration of one time LC limit, the bank issued a letter of arrangement dated 11th November, 2021 informing the respondent no. 1 that the appropriate authority has awarded approval for the one time restoration of LC limits for completion of ongoing Kerala Police Project subject to the condition that the entire outstanding of WCTL will be liquidated by 31.12.2021. Record reveals

that the respondent no. 1 has put his signature on the letter of arrangement dated 11.11.2021 and has also executed various documents. It appears from the letter of arrangement dated 11.11.2021 that the limit of LC was revised from the existing limit of zero to Rs. 2.00 crores and the existing limit of WCTL and FITL was revised to zero. It is evident from the material on record that the respondent no. 1 has accepted the letter of arrangement dated 11.11.2021 by virtue of which the authorities of the bank approved one time restoration of LC limit subject to liquidation of the entire outstanding of WCTL by 31.12.2021. Thus the aforesaid action of the parties gave rise to a fresh contract.

28. The Hon'ble Supreme Court in *Baghora Polylab (P) Ltd. (supra)* held that a contract may be discharged by the parties to the original contract either by entering into a new contract or by acceptance of performance of modified obligations in lieu of the obligations stipulated in the contract.

29. In the case on hand it is evident from the records that the respondent no.1 having executed documents in terms of the letter of arrangement dated 11.10.2021 have entered into a new contract in substitution of the original contract i.e. the restructuring of accounts vide letter dated 28.06.2021. Therefore, the original contract vide restructuring letter dated 28.06.2021 gets discharged by the subsequent act of the parties.

30. The respondent no. 1 after having accepted the conditions stipulated in the letter of arrangement dated 11.11.2021 cannot now turn around and pray for specific performance of the letter of arrangement dated 28th June, 2021 which got substituted by the acceptance of the terms and conditions of the subsequent letter of arrangement dated 11.11.2021.

31. The issue of non service of letter of arrangement dated 28.06.2021 which weighed with the learned Single Judge pales into insignificance in view of the aforesaid observations of this Court.

32. Mr. Rai contended that the respondent no.1 failed to comply with the conditions stipulated in the letter of arrangement dated 11.11.2021 as he did not liquidate the WCTL by 31.12.2021. Such issue is left open to be agitated before the appropriate forum.

33. For the reasons as aforesaid, this Court is of the considered view that after the respondent no. 1 accepted the letter of arrangement dated 11.11.2021, the cause of action for seeking specific performance of the letter of restructuring dated 28.06.2021 no longer survives. This Court, therefore, holds that the direction passed by the learned Single Judge upon the Bank to give effect to the letter of arrangement dated 28.06.2021 and to give the benefit of the same to the writ petitioner/respondent no. 1 herein calls for interference.

34. That apart admittedly the respondent no.1 approached the Writ Court in July, 2022 after issuance of the notices under Section 13(4) of the 2002 Act, though the respondent no.1 claims to have acquired knowledge of the letter dated 28.06.2021 on 27.11.2021. It is well settled proposition of law as held in *U.P Jal Nigam (supra)* that if an aggrieved party does not rise to the occasion in time, the court should be very slow in granting relief to such person. This court is, therefore, of the considered view that the respondent no.1 was not entitled to any relief from the writ court for not having approached the Court in time.

35. In so far as the direction passed by the learned Single Judge upon the bank to return to the writ petitioner any amount appropriated by the bank from the account of the respondent no. 1 for the purpose of adjustment or otherwise is concerned, this Court is of the considered view that since the respondent no. 1 claimed an identical relief in SA 221 of 2022, the learned Single Judge ought not to have passed such a direction as the accounts of the respondent no. 1 have been classified as NPA and such a direction would amount to interfering with the classification of the account of the respondent no. 1 as NPA by the bank.

36. It is not in dispute that the respondent no.1 approached the Writ Court after issuance of the notice under Section 13(4) of the 2002 Act. The respondent no.1 approached the Debts Recovery Tribunal during the pendency of the writ petition and the respondent no.1 has also prayed for refund of the amount of Rs. 92.56 lakhs therein. Pendency of the S.A 221 of 2022 was brought to the notice of the learned Single Judge when the writ petition was heard.

37. In *Devi Ispat Limited (supra)*, it was held that the statutory remedy having been availed of, nothing survived to be decided by the Writ Court.

38. In the case on hand, since the respondent no.1 has availed the statutory remedies under the 2002 Act, the learned Single Judge ought not to have entertained the prayer of respondent no.1 for refund of any amount. Such direction passed by the learned Single Judge also calls for interference.

39. Mr. Rai learned Advocate for the petitioner made elaborate submissions by referring to various clauses in the RBI master circular that since the home loan of the writ petitioner/respondent no. 1 became NPA on 01.10.2021 therefore, all accounts of the writ petitioner were rightly classified as NPA on 18.03.2022. Mr. Kohli would contend that the classification of his accounts as NPA on 18.03.2022 is bad. However, since the respondent no. 1 has already approached the Debts Recovery Tribunal by filing an application under Section 17 of the SARFAESI Act, 2002 being SA 221 of 2022 this Court refrains from making any observations on the submissions made by the respective parties in that regard.

40. The decision in *Mathew K.C (supra)* is not applicable to the case on hand as in the said reported decision the interim order was passed without assigning any reasons and without giving any opportunity to contest the maintainability of the writ petition.

41. *Umakanta Mohapatra (supra)* is distinguishable on fact as *it* deals with an issue as to whether interim order could be passed when the writ petition was not maintainable.

42. For all the reasons as aforesaid, the impugned judgment and order dated November 3, 2021 stands set aside and quashed. The appeal accordingly stands allowed. Before parting, this Court makes it clear that the observations made hereinbefore are only to support the conclusions in this appeal and the same shall not prejudice the rights of the parties in the proceedings pending before the Debts Recovery Tribunal-1, Kolkata.

43. There shall be, however, no order as to costs.

44. Urgent photostat certified copies, if applied for, be supplied to the parties upon compliance of all formalities.

I agree.

(T.S. Sivagnanam, CJ.)

(Hiranmay Bhattacharyya, J.)